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Supreme Court of the United States

OCTOBER TERM, 1992

SNOHOMISH COUNTY; THE SNOHOMISH COUNTY COUNCIL; and the SNOHOMISH COUNTY HEARING EXAMINER,
Petitioners,

v.

LUTHERAN DAY CARE, A NON-PROFIT CORPORATION,
Respondent.

On Petition for a Writ of Certiorari to the Supreme Court of the State of Washington

BRIEF OF THE COUNTIES OF OKANOGAN, DOUGLAS, YAKIMA, AND GRAYS HARBOR, WASHINGTON AS *AMICI CURIAE* IN SUPPORT OF THE PETITION FOR A WRIT OF CERTIORARI

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INTEREST OF *AMICI CURIAE*

Amici counties [1] are political subdivisions of the state of Washington. Their discretionary authority to grant or deny conditional use permits and variances are put into jeopardy by the Washington Supreme Court's decision in *Lutheran Day Care v. Snohomish County*, 119 Wash.2d

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[1] Amici file this brief as of right pursuant to Rule 37.5 of this court.

91, 829 P.2d 746 (1992). *Amici* counties are charged by both statute and common law with making fundamental land use decisions and this decision raises the specter of federal civil rights damages every time counties use hearing examiners or local boards of adjustment to vary or condition specific uses set forth in the local zoning code. Several *Amici* operate through local boards of adjustment which are volunteer citizen boards charged with using their judgment to humanely apply zoning codes. The decision puts at risk long established land use procedures that are useful and, in some circumstances necessary to the proper management of development in order to promote the general welfare. *Amici* counties can not possibly continue to responsibly and honestly exercise their authority when the specter of federal civil rights damages hangs over their heads for any misstep.

STATEMENT

Amici Curiae counties adopt the Statement of the Case filed by Snohomish County, *et al.*, the Petition for Writ of Certiorari.

SUMMARY OF ARGUMENT

The Supreme Court of the State of Washington has infected the body of the law with a dangerous bacillus. If the germ takes hold, the effect on the legal system will certainly be congestion of the courts because nearly every denial of a conditional use permit or variance will, quite literally, become a federal case. Long settled local land use practice and law throughout the nation may be completely overhauled for no apparent reason. Local control over the most basic land use decisions will frequently be given over to the federal courts. All land use decisions which receive judicial review will have to be appealed to the highest judicial authority as a matter of common prudence to avoid federal tort damages.

Because the Washington court chose to use the federal civil rights statute, 42 U.S.C. § 1983, as the method of

infection, the disease will certainly spread rapidly throughout the bodiy politic of the nation. If pure State law had been the basis of the decision, the disease might eventually spread outside the Washington system, but surely much more slowly. The use of federal statutes does, however, give this Court the opportunity to cure the infection before it has a chance to spread. *Amici* urge this Court to do so by setting out clear limits to the role of federal civil rights law in discretionary local land use decisions.

ARGUMENT

I. THE ERROR

A. The Washington Supreme Court's Opinion Improperly Concludes That Nearly Every Erroneous Denial of a Quasi Judicial Discretionary Land Use Application Creates Liability for Local Government Under § 1983

Amici believe that the Washington Court made several legal and logical errors in this opinion. The main error, which this Court has the ability to correct, is found in the following passage at 119 Wash.2d 91 at 125:

> Along with the vast majority of federal courts, we recognized that denial of a building permit, under certain circumstances, may give rise to a substantive due process claim. (Citations omitted) *R/L Assocs., Inc. v. Seattle*, 113 Wash.2d 402, 412, 780 P.2d 838 (1989). We see no reason to treat denial of a conditional use permit any differently. Such denial therefore can constitute a due process violation. Such a violation is made out, however, only if the decision to deny the permit is "invidious or irrational" or "arbitrary or capricious". *R/L Assocs., Inc.*, at 412. In the present case, the trial court can be interpreted as denying appellant's due proces claim based on the fact that the County did not act knowingly or recklessly in denying the permit. This is the wrong standard. The standard is arbitrary or capricious and as already discussed, Judge Kershner's finding in the certiorari action that the County acted arbitrarily and

> capriciously in denying the permit conclusively satisfies that standard. Appellant therefore has established as a matter of law and fact that the County violated substantive due process when it denied the conditional use permit.
>
> Because all of the other prerequisites to a § 1983 claim have been satisfied, appellant is entitled to relief. The trial court's grant of summary judgment to the County and its denial of summary judgment to appellant must therefore be reversed.

The logical train of this conclusory passage derails at two points: First, the court ignores the discretionary nature of the conditional use permit by treating it the same as a building permit, the granting of which is a ministerial function of government. Second, the opinion relies on the magic words "arbitrary and capricious" in a trial court's opinion to automatically and without any analysis confer "strict" liability under § 1983.

1. *A Conditional Use Permit Is Not A Building Permit And Their Confusion Could Have Profound Untoward Consequences*

A nearly universal feature of modern land use law and practice is the increasing use of flexible or discretionary zoning devices such as conditional uses, special exceptions, and variances. This Court has frequently recognized the existence of such devices and their usefulness in moderating the often harsh strictures of traditional zoning codes. See, e.g., *Williamson Co. Regional Planning Commission v. Hamilton Bank*, 473 U.S. 172, 188-190 (1985).

The central feature of these devices is their discretionary nature. Their employment requires some type of judicial-style hearing with the taking of evidence, creation of a record, and entry of findings and conclusions. This is certainly the case in Washington. Wash. Rev. Code §§ 36.70.020(7), 36.70.810, 36.0.970, cert. petition appendix pp. 233a-236a. See also Settle, *Washington*

Land Use and Environmental Law and Practice, § 2.10 at 52, et seq., and § 2.12, at 64, et seq. Butterworth Legal Publishers (Seattle, 1983).

Petitioner Snohomish County has argued compellingly in its petition that the discretionary nature in the granting of a conditional use permit removes such a permit from the set of property rights protected by the fourteenth amendment and § 1983. We will not labor the Court with a reiteration of that argument.

It is our contention, however, that the discretionary nature and the procedural and judicial oversight inherent in these discretionary devices does, at the very least, remove this from the family of a *substantive* due process rights. Put another way, if the granting of a conditional use permit is discretionary and, as the name applies, "conditional", the applicant does not have a substantive property right in it (*Bateson v. Geisse*, 857 F.2d 1300, 1305 (9th Cir. 1988)), and at most, has a legitimate expectation for procedural regularity in determining the application.

The most that can be said of the decision by the hearing examiner in the case at bench is that it was, perhaps, wrong. A Court has already determined that there is no evidence whatsoever that the process was knowingly or recklessly improper, 119 Wash.2d at 125, *supra*; and there is no hint, in this case, of any malicious intent. In such a circumstance we have the redress of judicial review to correct the improper exercise of discretion. That is the purpose of writs of review or certiorari under Washington law. Wash. Rev. Code §§ 7.16.030, 040, cert. pet. app. at page 231a. We can find no case anywhere where a federal civil rights damage remedy was added on top of the normal local judicial remediation of a quasi-judicial action.

If every procedural irregularity that results in a legally incorrect conclusion gives rise to federal damages (regardless of its later correction by the judiciary) there is

clearly a potential for the federal courts to be involved in every discretionary land use decision made throughout the country including the most minor variance of any zoning code anywhere.

2. *"Arbitrary And Capricious" Means Many Different Things In Washington And Therefore Its Use As A Criterion To Impose Federal Damages Is Arbitrary And Capricious*

This Court has frequently cautioned againse the use of totemic language in place of legal reasoning. *Complete Auto Transit, Inc. v. Brady*, 430 U.S. 284 (1977); *Public Service Commission of Utah v. U.S.*, 356 U.S. 421, 434 (1958) (Frankfurter, J., dissenting); *Sochor v. Florida*, —— U.S. ——, 112 S.Ct. 2114, 2123 (1992) (O'Connor, J., concurring). Yet the Washington State Supreme Court has done just that. In the above quoted section that court states that as long as the trial court spoke the magic words "arbitrary and capricious" and no appeal was taken, damages are due. The state supreme court did not inquire as to the factual background of the superior court's decision or even the reasons why it uttered the incantation.

This lapse in the Washington Supreme Court's judicial analysis might be understandable if the term "arbitrary and capricious" had a consistent, well known, and absolute interpretation throughout the state's law. Because the term does not have such uniform interpretation, and because it is *the* basic standard for review of discretionary decisions, Wash. Rev. Code § 7.16.120, cert. pet. app. at 233a; *Bay Industry v. Jefferson Co.*, 33 Wash. App. 239, 241, 653 P.2d 1355 (1982), the Washington decision unambiguously creates strict liability under *federal* statute for conditional land use permits and all other "discretionary zoning" and variance procedures.

Washington, like most jurisdictions, has a basic definition for the "arbitrary and capricious" standard. It runs as follows:

> Arbitrary and capricious action of administrative bodies means wilful and unreasoning action, without consideration and in disregard of facts and circumstances. Where there is room for two opinions, action is not arbitrary or capricious when exercised honestly and upon due consideration, even though it may be believed that an erroneous conclusion has been reached.

Lillions v. Gibbs, 47 Wash.2d 629, 633, 289 P.2d 203 (1955).

Unfortunately, Washington courts—like most courts—have gone through activist phases, where they have felt hamstrung by this very narrow scope of review. Thus, although this basic definition is frequently repeated, it has probably just as frequently been relaxed when the reviewing court disagrees with the quasi-judicial decision below. There is, for example, a line of cases where decisions have been reversed as arbitrary and capricious because of an incomplete record, or the reviewing court's sense that the administrative body decided on facts and personal experience that were not in the record. *State ex rel. Tidewater-Shaver v. Kuykendall*, 42 Wash.2d 855, 891, 259 P.2d 838 (1953); and *see State ex rel. Country Club v. Department of Public Service*, 198 Wash. 37, 47-48, 86 P.2d 1104 (1939). If one takes these cases literally, an action could be found arbitrary and capricious because of a lazy scrivener or a faulty tape machine. This should not be the cause of federal damages.

As well, although an error of law is an alternative standard of review in a writ of certiorari or review, our Courts frequently confuse the standards and have stated that an error of law is *per se* arbitrary and capricious:

> For the School Board to rely upon the so called "two options" doctrine, however, [see quotation above] it is required that each opinion be based on sound reasoning and founded upon fact, for if only one opinion is in accord with existing law and supported by the

> record, a contrary decision by the public agency involved constitutes willful and unreasoning action.

Butler v. Federal Way School District, 17 Wash. App. 288, 296, 562 P.2d 271 (1977); see also *Helland v. King County Civil Service Commission*, 84 Wash.2d 858, 863, 529 P.2d 1058 (1975).

In fact, the pretense of uniform judicial deference to administrative boards under the *Lillions* definition of "arbitrary and capricious" conduct disappeared from the landscape as early as 1972 when our supreme court decided a spot zoning case. It pointed out that because spot zoning benefits only a few and may be a disadvantage to some or many, it is therefore not for the general welfare. It then stated that "[b]ecause the action was not for the '*general* welfare', it was in turn arbitrary and capricious." (emphasis in the original). *Anderson v. Island County*, 81 Wash.2d 312, 325, 501 P.2d 594 (1972).

As these cases demonstrate, the arbitrary and capricious standard is not consistently applied and can mean as little as your record was inadequate, you made an error of law, or the reviewing court believed your action was contrary to the general welfare. *Amici* believe that federal damages should not be imposed under such circumstances.

II. THE CONSEQUENCES

A. Because § 1983 Federal Damages Are Now Available in Nearly Any Unappealed Erroneous Land Use Decision, Federal Courts Can Expect Hundreds of Such Cases, and Municipalities and Applicants Will Be Motivated to Take Every Case to the Appellate Limit

As we have stated, the arbitrary and capricious standard is the basic standard of review for discretionary land use decisions. (Section A2, *supra*). Therefore, most adverse judicial determinations will have the words "arbitrary and capricious" attached. If the Washington Supreme Court is upheld in this decision, all such initial

judicial reviews, if not appealed, will be determinative of civil rights damages under § 1983.

The main consequence of this unavoidable conclusion is that successful review petitioners will begin demanding those damages. Because the state issues will have all been disposed of in this opinion, the successful petitioner need only wait until the state appeal period has run before he jumps into state or federal court to ask for his damages. It appears inconceivable to *Amici* that they will not do this. Liability will have been determined already; the amount of damages will be the only question. Most litigants do not turn down free money.

Initially, we can expect this influx in the Washington federal courts. If Certiorari is denied in this case, we can probably expect that litigants all over the country will view that denial as permission to apply to their own federal courts for similar relief. We believe this consequence is unavoidable.

Local governments, faced with this possibility, will have two options: Either appeal every land use decision to the limit or grant every application for a conditional use permit or variance.

As things stood before this opinion, local officials were able to carefully weigh the consequences to the community of acceding to the judicial determination, against the cost of appealing that determination. They will no longer be able to make that careful calculation. Every variance, special use, conditional use or other discretionary device will have to be appealed to avoid federal damages if a municipal denial is reversed. If the lower court's adverse decision is upheld by the appeal, the damages will still accrue, but wherever there is substantial reason to believe that the trial court made an error, ordinary prudence would dictate that appeal must be pursued.

The other method by which local government might choose to deal with this decision is to remove the dis-

cretionary nature of conditional use permits and variances. Government can not be sued for denying conditional use permits if it always grants them. The problem with this approach is that the Legislature gave local land use boards this tool for dealing with land use issues. It should be up to the Legislature to take them away, not the state supreme court by implication.

The dilemmas are more acute for small communities. Unlike Snohomish County, *Amicus* Okanogan County, for example, is large but sparsely populated and relies on an all-volunteer board of adjustment made up of local shopkeepers, ranchers, and orchardists. They are not professionaly trained hearing examiners, attorneys, or planners. They do, however, embody the sense of the community on what types of uses are appropriate and inappropriate in a certain neighborhood within a zone. The best that law should require of them is that they exercise their authority honestly with the good of the community in mind. To make them individually, or the county, liable in civil rights damages for procedural imperfections is grossly unfair and socially irresponsible.

CONCLUSION

For the foregoing reasons, the petition for writ of certiorari filed by Snohomish County should be granted.

Respectfully submitted,

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